IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

FIRST APPEAL (ST) NO. 310 OF 2003

Oriental Insurance Co. Ltd. ... Applicant

Vs.

Ms. Neha Shjrirang Mitragotri and others ... Respondents

Mr. S.S. Vaidyanatha for the Applicant

Mr. Umesh G. Deshpande for Respondent Nos. 1 to 5.

Mr. M.B. Kotak for Respondent No. 10.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : AUGUST 25, 2004

P.C.

1. The matter not on board. By consent of parties taken on board and heard forthwith.

2. This is an appeal by the Insurance Company challenging the judgement dated 30.5.2002 passed by the Additional Member, Maharashtra Accident Claim Tribunal, Pune in Claim Petition No. 1066 of 1996 whereby the compensation has been awarded in the sum of Rs.6,47,305/-. The applicants before the Claim Tribunal were Appellant No. 1 and 2, children of the deceased, the appellant No. 3

widow of the deceased and Appellant Nos. 4 and 5 the parents of the deceased. The amount has been apportioned in terms set out in the order. The driver and the owner of the vehicle though served chose not to appear and as such the matter proceeded exparte against them. The Appellant Insurance Company though served and appeared failed to file its written statement. As such the matter proceeded against them in the absence of written statement. Similarly the Driver and Opponent No. 4 of the other vehicle though served did not appear. The insurance Company, namely National Insurance Company wrongly described as Oriental Insurance Company in the judgement were the insurer of Maruti Esteem Car No. MH 12/W-7952.

3. On issues being framed the learned Claims Tribunal came to the conclusion that the accident occurred on account of negligent driving of Maruti Car No. MH-12/P-4995. Accordingly allowed the claim in terms of the award.

4. The present appeal has been preferred by Original Respondent No. 3. The grounds taken in the appeal are basically to challenge the award on merits. The law on the subject of the Insurance

Company in preferring an appeal against an award are governed by the provisions of the Section 149(2) of the Motor Vehicles Act, 1988. Section 149(2) specifically set out that the Insurer to whom notice of bringing of such proceeding is given shall be entitled to be made party thereto and defend the action on any of the grounds as set out therein. There is additional power in the tribunal to permit the insurer to raise grounds other than set out under Section 149(2). Under Section 170 where in the course of any enquiry the claims tribunal is satisfied that there is collusion between the person making the claim and or the person against whom the claim is made fails to contest the claim for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, to be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Sub Section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

4. Section 170(2) has been read to mean not only in the case where the notice was not served but

also in cases of collusion or failure of the owner to contest. In other words the Insurance Company may in the course of enquiry call on the tribunal to permit it to defend the petition on other grounds though it is contesting the proceedings under Section 149(2) and on such application being made, the tribunal may for the reasons to be recorded grant such permission. In the instant case, no such permission was granted and as can be seen from the order of the Claims Tribunal. The appellant also did not file written statement.

5. The learned counsel for the Appellant draws our attention to the judgement of the Apex Court in the case of Balbahadur Singh Vs. Oriental Insurance Co. Ltd. and Ors. 2001 ACJ 1345 to contend that where the Insurance Policy contains a condition enabling the insurer to defend the action on other grounds. They can do so. Having perused the judgement, we find that though such an issue was raised it was not answered. The law on the subject under Act of 1988 stands concluded in the case of National Insurance Co. Ltd. Vs. Nicolletta Rohtagi and others, 2002 ACJ 1950. The Apex Court has clearly set out that the Insurance Company can not avoid the liability on any other grounds except

those mentioned in Sub Section (2) of Section 149. The learned counsel however, points out that the issue considered in the case of British India Gen. Insurance Co. Ltd. Vs. Capt. Iftar Singh 1958 -65 ACJ 1 (SC) was not considered while deciding the issue in Nicolleta Rohtagi (supra). We are not called upon to go into that aspect of the matter as the earlier judgement was under the provisions of the Motor Vehicle Act, 1939. The Apex Court has now considered the provisions of Section 149 of the Act of 1988. Subsequently another Bench of the Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and others, 2004 ACJ 1 had approved the ratio of the judgement in National Insurance Co. Ltd. Vs. Nicolletta Rohatagi and others (supra) as set out in Paragraph 32 of the said judgement.The Apex Court in that judgment has considered the judgement in the case of British India (supra). The Apex Court in Para 42 further observed that the Insurance Company with a view to avoid its liability is not only required to show that the condition laid down under Section 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. Considering the judgment of the Apex Court, we are of the view that

the law on the subject stands concluded.

. For the aforesaid reasons, we find no merit in the appeal which is accordingly dismissed.

(F.I. REBELLO,J.)

(ANOOP V. MOHTA,J.)